



August 6, 2008

Lieutenant General Robert L. Van Antwerp  
Commander and Chief of Engineers  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Dear General Van Antwerp:

As the nation's oldest and largest construction industry association, the Associated General Contractors of America (AGC) has maintained heightened interest in plans by the Hurricane Protection Office (HPO) to solicit a request for proposals later in the year for a significant amount of clay in order to fulfill the needs of the massive recovery efforts in New Orleans and south Louisiana. AGC is interested in maintaining an open and competitive system for the awarding of these contracts. However, AGC is concerned that the commitment by the HPO to preserve a competitive environment will unintentionally limit the pool of qualified contractors from engaging in the competition for the contracts for a variety of reasons.

On April 29, 2008 the HPO posted a pre-solicitation notice to Supply and Transport an Estimated 25,594,000 Tons of Earthen Clay (W912P8-08-R-0022). The notice stated that the solicitation would be a "supply contract" and that "reverse auctioning" may be utilized to evaluate price. During the pre-solicitation phase, many of our members communicated to HQUSACE, the HPO and to the points of contact for the administration of this solicitation numerous concerns over the potential utilization of a reverse auction as a primary procurement tool to award this contract and the misclassification of the nature of the work to be performed under the solicitation.

It has since come to my attention that with the release of final solicitation notice posed on [www.fbo.gov](http://www.fbo.gov), the HPO certainly intends to utilize reverse auctioning to evaluate award of the solicitation. The notice also continues to classify this contract as a supply contract. As USACE's construction partner, AGC is compelled to share our grave concerns and objections on the use of reverse auctioning and the classification of the solicitation as a supply contract.

### **AGC White Paper and Policy on Reverse Auctions**

AGC has found owners, both public and private, maximize their results when they require or encourage competition on all of the relevant "fronts," including but not limited to price, schedule, safety, quality, responsiveness, and past performance. The Federal government has spent many years developing new methods in how construction contracts are structured, thus

enabling the Federal agencies to emphasize the factors considered to be most important. Historically, when owners consider price and price-related factors to be most important, sealed bidding has been the most successful means of procuring construction contracts. This time-tested method ensures the integrity of the procurement process. When owners consider non-price factors to be important, or wish to discuss the work with the competitors, they engage in some form of negotiation, using an alternative contractor selection process and project delivery system.

Regardless of the procurement method selected, knowledgeable owners value healthy and vibrant relationships with their construction contractors, recognizing that each project entails unique variables that require consistent, sustained communication and the willingness of both parties to address and work through project difficulties and issues. This has been true of the USACE experience.

As outlined in AGC's own White Paper on Reverse Auctions (see enclosure), contractors with experience in reverse auctions have repeatedly reported that this is an acquisition tool that disregards processes focused on negotiation to expand communication between the owner and prospective contractors for the purpose of discussing selection criteria such as qualifications, past performance and unique needs. Reverse auctions are not successful as a cost savings method for acquiring construction and construction-related services. In fact, no public or private studies, including USACE's own study on the issue, provided persuasive evidence that reverse auctions generate savings for the procurement of construction and construction-related services.

### **USACE Report and Policy on Reverse Auctions**

We have reviewed the findings of the USACE study, published in 2004 entitled "Final Report Regarding the U.S. Army Corps of Engineers Pilot Program on Reverse Auctioning" (see enclosure). The report determined that although reverse auctioning had potential in the purchase of "simple commodities" where variability is exceedingly small or nil (identical products under identical conditions), its use for the purchase of construction services where the dynamics and variables are just too diverse (one-of-a-kind projects under different one-of-a-kind conditions) "should be the very rare exception and not the rule – if used at all." The Corps report further states that on the rare occasion reverse auctioning may be considered as an acquisition method, such consideration should only be made after sealed bidding has failed. Accordingly, HPO's use of reverse auctioning in the proposed solicitation contravenes USACE's own findings and recommendations detailed in its Reverse Auction Pilot Program final report to Congress.

On March 6, 2008, MG Ronald L. Johnson, former Deputy Commanding General of the U.S. Army Corps of Engineers, testified before the House Committee on Small Business on this very issue. MG Johnson testified that "The Corps, through our pilot study, found no basis to claim that reverse auctioning provided any significant or marginal savings over a traditional contracting process for construction or construction services." MG Johnson also testified that "While this tool may be appropriate and beneficial in more repetitive types of acquisition, we did not find it to be a useful tool for our construction program and do not currently utilize it today to any great extent." Accordingly, HPO's use of reverse auctioning in the proposed solicitation contradicts the Corps own testimony before the House Committee on Small Business (see enclosure).

## **Construction Is Not A Commodity**

The proposed solicitation is in reality for the procurement of construction services and not for the purchase of a simple commodity. The HPO has decided to conduct the solicitation as a supply contract using NAICS Code 212325 - Clay and Ceramic and Refractory Minerals Mining. This classification gives HPO the flexibility to procure this solicitation as a commodity contract. That subtle nuance, however, does not change the facts on the ground that this will be managed, conducted and delivered in a manner that is consistent with the delivery of a standard construction services contract.

The contract awardee will certainly have a multitude of diverse challenges and highly variable conditions that must be addressed in a manner that is consistent with the procurement of a construction services contract. Construction services in this solicitation include, but are not limited to, the excavation of 25,594,000 tons of clay material from borrow sites, transport of the clay material to designated sites, and processing of the clay material to achieve the specified level of moisture. The work is subject to, among other things, weather conditions from daily rain to hurricanes as well as rapidly rising diesel fuel prices, as well as conditions that introduce an extreme degree of variability to production, cost and time. The complexities of these processes simply do not equivocate to the purchase of an off-the-shelf commercial item.

## **Surety Bonding Considerations**

AGC has strongly supported the spirit of the Miller Act, which has successfully protected the government and subcontractors over the past 70 years. The Act, by requiring a prime contractor to post both a payment and a performance bond to ensure the delivery of a construction project, shields the government from liability if a contractor fails to pay subcontractors or suppliers.

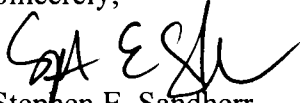
Since this solicitation, as it currently stands, classifies this contract as a supply contract the proposed solicitation does not contain any bonding requirements. AGC is quite surprised to find that the HPO appears willing to award a contract with so much inherent risk at an estimated cost likely to substantially exceed \$100 million to a small business set-aside and not require bonding to guarantee performance for a critical project that is key to the success of the reconstruction and fortification of south Louisiana.

## **Concluding Remarks**

Current procurement practices and processes recognize the value and quality of project relationships and other factors that promote greater collaboration among the owner and project team members. Reverse auctions, on the other hand, do not promote communication between the parties. Current studies of reverse auctions between buyers and suppliers have found that reverse auctions often have a deleterious effect on the relationship between buyer and seller. Moreover, non-price factors that are of consequence to the owner, such as quality of relationship, past performance, and unique needs, are deemphasized in the auction.

AGC realizes and greatly appreciates the complexity of the intertwining issues facing the Corps in New Orleans and south Louisiana as well as the pressures of meeting budget and schedule. However, we remain convinced that the HPO's decision-making is flawed if it believes that reverse auctioning will result in the lowest price and the shortest time to complete the hurricane protection work. The HPO has had success with "best value" negotiated procurements and for the proposed solicitation HPO should not abandon this time-tested method. We urge you to work with leaders at the HPO to ensure this procurement is procured as a construction contract and that the HPO reverse its decision to utilize the reverse auction procurement tool.

Sincerely,



Stephen E. Sandherr  
Chief Executive Officer

cc:

MG Don Riley  
Deputy Commander  
HQUSACE

Mr. Steve Stockton  
Director, Civil Works  
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The Honorable Nydia Velazquez  
Chairwoman  
House Committee on Small Business

The Honorable Steve Chabot  
Ranking Member  
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